

MANDATE

14-3511-ag

NLRB v. Onyx Management Group LLC

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Thurgood Marshall United
States Courthouse, 40 Foley Square, in the City of New York,
on the 26th day of August, two thousand fifteen.

PRESENT: JON O. NEWMAN,
JOHN M. WALKER, JR.,
DENNIS JACOBS,
Circuit Judges.

- - - - -X
NATIONAL LABOR RELATIONS BOARD,
Petitioner,

-v.-

14-3511-ag

ONYX MANAGEMENT GROUP LLC,
Respondent.

FOR PETITIONER:

MARNI VON WILPERT (Kira
Dellinger Vol, Richard F.
Griffin, Jr., Jennifer Abruzzo,
John H. Ferguson, and Linda
Dreeben, on the brief), National
Labor Relations Board,
Washington, D.C.

1 **FOR RESPONDENT:**

GAIL L. GOTTEHRER (Aaron
Feigenbaum, on the brief),
Axinn, Veltrop & Harkrider LLP,
New York, New York.

6 Petition to enforce an order of the National Labor
7 Relations Board.

9 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
10 **AND DECREED** that the petition of the National Labor
11 Relations Board be **GRANTED**.

12
13 The National Labor Relations Board (the "Board")
14 petitions, pursuant to 29 U.S.C. § 160(e), to enforce an
15 order against Onyx Management Group LLC ("Onyx") for
16 refusing to bargain with nine employees certified as a
17 bargaining unit of the International Union of Operating
18 Engineers, Local 30, AFL-CIO, in violation of the National
19 Labor Relations Act (the "Act"), 29 U.S.C. § 158(a)(1), (5).
20 Onyx concedes refusal to bargain, but contends that the unit
21 was improperly certified. We assume the parties'
22 familiarity with the underlying facts, the procedural
23 history, and the issues presented for review.

24
25 The bargaining unit certified by the Board includes
26 nine employees: five "inside maintenance workers" and four
27 "outside groundsmen," including lead outside groundsman Mark
28 Weymouth. Onyx challenges the Board's findings that:
29 (1) Weymouth does not function as a supervisor and (2) the
30 inside maintenance workers and outside groundsmen share a
31 community of interest. The Board's factual finding as to
32 supervisory status is conclusive if supported by substantial
33 evidence, NLRB v. Quinnipiac Coll., 256 F.3d 68, 73 (2d Cir.
34 2001); and its determination as to community of interest
35 "will stand unless arbitrary and unreasonable," Staten
36 Island Univ. Hosp. v. NLRB, 24 F.3d 450, 455 (2d Cir. 1994).

37
38 1. Supervisory Status. Supervisors do not have a
39 right to participate in collective bargaining. 29 U.S.C.
40 § 164(a); Quinnipiac Coll., 256 F.3d at 73. The Act defines
41 a "supervisor" as an individual that exercises any one of
42 twelve statutorily enumerated powers while using
43 "independent judgment" and acting "in the interest of the
44 employer." 29 U.S.C. § 152(11); Schnurmacher Nursing Home
45 v. NLRB, 214 F.3d 260, 264 (2d Cir. 2000).
46

1 One of the enumerated powers is the power to "assign
 2 . . . other employees." 29 U.S.C. § 152(11). Onyx argues
 3 that Weymouth had the power to assign tasks to other outside
 4 groundsman and used independent judgment in exercising this
 5 power.
 6

7 The Board's conclusion to the contrary is supported by
 8 substantial evidence. It is undisputed that Weymouth meets
 9 with Mark Cimilluca (Onyx's Property Manager) every morning
 10 to discuss tasks that need to be performed and then relays
 11 Cimilluca's wishes to the other outside groundsman. Joint
 12 App'x 94-98, 168-69. Apart from serving in this liaison
 13 capacity, Weymouth performs the same work as the other
 14 groundsman (mowing, landscaping, and so forth) and does so
 15 pursuant to directives from Cimilluca. *Id.* 106-07. Onyx
 16 seizes on various references in the record that the
 17 groundsman "report to" Weymouth and that he "delegate[s]" to
 18 them. *Id.* 54-55, 168-69.¹ But those references could
 19 reasonably be read as referring to Weymouth's role in
 20 *communicating* management directives from Cimilluca. And to
 21 the extent that the other groundsman defer to Weymouth as to
 22 task prioritization, deference to a more experienced
 23 colleague is not acquiescence to a superior.
 24

25 On this record, we are satisfied that the Board's
 26 conclusion that Weymouth is not a supervisor is supported by
 27 substantial evidence.²
 28

29 2. Community of Interest. The Board is empowered to
 30 determine "whether . . . the unit appropriate for the
 31 purposes of collective bargaining shall be the employer
 32 unit, craft unit, plant unit, or subdivision thereof." 29
 33 U.S.C. § 159(b). "The determination . . . requires
 34 selection of an appropriate unit, not the *most* appropriate
 35 unit, and the NLRB's decision will stand unless arbitrary

¹ Other references in the record that Weymouth
 "supervises" the groundsman are also not dispositive.
 Whether or not an individual is a "supervisor" under the Act
 is a functional analysis and is not controlled by labels.
 See Quinnipiac Coll., 256 F.3d at 75-76 (analyzing actual
 tasks performed by "shift supervisors").

² In light of this conclusion, we need not decide
 whether Weymouth's participation in the election "tainted"
 the outcome. See Quinnipiac Coll., 256 F.3d at 81.

1 and unreasonable." Staten Island Univ. Hosp., 24 F.3d at
2 455 (citation omitted). A unit is appropriate if its
3 members share "a substantial community of interests." Id.
4

5 To be sure, the degree of cohesion within each group of
6 indoor employees and outdoor employees is greater than the
7 cohesion between those two groups: the groups (generally)
8 perform different tasks, work on different schedules, and
9 infrequently interact with each other. Notwithstanding
10 those differences, the Board concluded that the two groups
11 share a community of interest because they receive
12 comparable pay and benefits and are subordinate to a common
13 supervisor, Cimilluca. See Staten Island Univ. Hosp., 24
14 F.3d at 454 ("The degree of shared interests is measured by
15 eight factors: [including] . . . similarity of employment
16 conditions, centralization of administration, managerial and
17 supervisory control . . ."). On this record, we are
18 satisfied that the Board did not act arbitrarily in
19 concluding that a sufficient community of interest existed
20 to certify a bargaining unit containing both groups.
21

22 For the foregoing reasons, and finding no merit in
23 Onyx's other arguments, we hereby **GRANT** the petition of the
24 Board.
25

26 FOR THE COURT:
27 CATHERINE O'HAGAN WOLFE, CLERK


A circular official seal of the United States Court of Appeals, Second Circuit, is stamped over the signature. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


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